Supreme Court of the United States

OCTOBER TERM, 1956

No. 858

KENNETH ERNEST CHODORSKI, Petitioner

v.

UNITED STATES OF AMERICA

Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MAY IT PLEASE THE COURT:

Now comes petitioner and makes this brief reply to the brief for the United States in opposition.

I.

It is suggested by the Government that the decision of this Court in *Bowles* v. *United States,* 319 U. S. 33, 35-36 (1943), is applicable. The *Bowles* case is not in point because in that case it affirmatively appeared that the Presidential Appeal Board did not follow the erroneous theory of the local board. There the Presidential Appeal Board made a memorandum of its reasons which were different from those of the lower board in that case. In this case the appeal board did not make a memorandum of its reasons for decision as did the Presidential Appeal Board in that

case. This Court is required to speculate in this case that the appeal board did not apply the erroneous theory of the local board, which can not be done in a criminal case of this kind. (*Dickinson* v. *United States,* 346 U. S. 389 (1953) at page 397) This is especially true in this case since the appeal board failed to make a memorandum of reasons for its decision or make findings of fact or conclusions of law for the decision. (*Ypparila* v. *United States,* 219 F. 2d 465 (10th Cir. 1954); *United States* v. *Hagaman,* 213 F. 2d 86 (3rd Cir. 1954)) The burden is upon the Government to show affirmatively that the error of the local board did not affect the appeal board's decision and this burden has not been met in this case. (See *Steele* v. *United States,* 240 F. 2d 142 (1st Cir. 1956).) In the absence of such a showing by the Government it is presumed that the error of the local board was followed by the appeal board in this case.

II.

The Government argues that *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir. 1950) and *Mintz* v. *Howlett,* 207 F. 2d 758 (2d Cir. 1953), involved a situation where the error was shown to have reached into the appeal boards. This is not so. The records in the *Niznik* and *Mintz* cases are identical to that in this case and the decision of the court below is, therefore, in irreconcilable conflict with the decisions of the Courts of Appeals for the Second Circuit and the Sixth Circuit in those cases.

CONCLUSION

WHEREFORE, for the reasons stated in the petition for writ of certiorari and for the further reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

April, 1957.